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Before the
FEDERAL COMMUNICATIONS COMMISSION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements For Nondominant Common Carriers	)	CC Docket No. 93-36

COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

In an increasingly competitive interstate telecommunications marketplace, the Commission should differentiate its tariffing requirements on the basis of the competitiveness of relevant geographical and product markets, not the identity of the individual service provider. The tariffing requirements imposed on all carriers serving competitive markets should be the same, regardless of what other markets each carrier serves. Only by leveling the playing field will the intended benefits of streamlined tariffing be realized.[2] The Commission has in place

affiliates of billion-dollar corporate enterprises that need no nurturing by the Commission. The Commission, therefore, has no reason to continue to outlaw true competition in these markets. The current alternative, asymmetrical pseudo-competition, in which one set of competitors has no pricing constraints, while others must meet strict regulatory restrictions, amounts to a handicapping of the race and has no lawful basis in the Communications Act or the Constitution.

Although the Commission should streamline its tariff rules for all carriers in competitive markets, it cannot lawfully adopt its pricing proposals. Section 203 of the Communications Act requires that a carrier's tariffs "show[] all charges" for its communications services, and that the carrier charge only exactly the "charges *specified*" in the tariff.[3] The Commission's proposal to permit tariffs that merely list maximum rates, or a range of rates within which the charge to any customer will fall, clearly conflicts with this statutory requirement and cannot be sustained.

II. Tariffing Requirements Should Vary By Market, Not Carrier.

Many metropolitan exchange access markets have become, or are rapidly becoming, effectively competitive. As discussed

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[3] 47 U.S.C. § 203(a), (c) (emphasis added). Bell Atlantic does not suggest that this provision precludes individual case basis ("ICB") rates to meet unique customer requirements, provided the tariff so specifies.

below, competitive access providers ("CAPs") and interexchange carriers ("IXCs") have secured large market shares in the high-capacity special access market. Should the Commission authorize expanded switched access competition,[4] similar inroads into the switched access market will quickly follow. Competition in these

billion by 1995.[6] As these figures graphically illustrate, the CAPs' growth is almost entirely at the expense of the LECs, and the LEC losses will continue.[7] Over 80% of Bell Atlantic's high capacity special access business is concentrated in its initial 169 collocation central offices, and all of that traffic will shortly be subject to even more aggressive competition. If the Commission continues to prohibit the local exchange carriers from competing, Bell Atlantic will be unable to retain the bulk of that business, not because its services are lower quality or higher cost, but solely because of artificial regulatory restrictions.

The CAPs are not small start-up companies. As subsidiaries of giant conglomerates such as Peter Kiewit Sons, and of the major nationwide cable television operators -- TCI, Cox, Comcast, and Sammons, for example -- they have access to all the resources they need to overbuild the LECs' networks and compete for access traffic in any areas they choose. If the Commission gives them free rein but keeps the LECs on a tight regulatory tether, it will have decided as a matter of national policy that the incumbent LECs should lose the choicest portions of the

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[6] Connecticut Research, *1992 Alternative Local Transport ... A Total Industry Report* at 38.

[7] Teleport, for example, has admitted that much of the CAPs' traffic is merely shifted from the local exchange carriers. *See* Opposition to Motions for Exemption, CC Docket No. 91-141 at 2 (March 15, 1993) ("Interconnector spaces may in many cases shift demand from LEC equipment to interconnector equipment, thus having little or no cumulative impact on total space requirements.").

competitive marketplace to the new entrants. Even if the Commission could reasonably make such a public interest finding, which it clearly cannot, the Communications Act contains no provision giving the Commission this authority, and such action would violate the equal protection requirements of Fifth and Fourteen Amendments of the Constitution.[8]

The Commission should scrap its concept of "dominant" and "non-dominant" carriers and set tariff requirements based on the competitiveness of the geographical and product market, not on the basis of other markets that a carrier serves. By streamlining tariffing for *all* carriers in competitive markets, not just for a favored few, while retaining existing rules in currently uncontested markets, the Commission will level the playing field and give the public a true choice of service providers.

A geographical market for a particular product or service should be considered competitive under any of the following conditions:

> 1. At least two unaffiliated carriers each offers a comparable service to at least 50 percent of potential customers for the service in the area;[9]

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[8] *Mathews v. De Castro*, 429 U.S. 181 (1976). *See, also, Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 780 (D.C. Cir. 1969) (an agency "cannot act arbitrarily nor can it treat similar situations in dissimilar ways."); *Garrett v. FCC*, 513 F.2d 1056,

2. The number of units of a service provided by unaffiliated carriers other than the carrier that provides the largest number of units of a service exceeds 15 percent of total units provided in the area;[10]

3. Unaffiliated carriers other than the carrier that provides the largest number of units of a service have the aggregate network capacity, or can have the capacity within one year with a reasonable expenditure of resources, to provide service to at least 75 percent of potential customers.[11]

When any of the above conditions is met, the geographical market for the service is competitive. All carriers that provide that service in that market should be subject to the same streamlined tariffing requirements.

The Commission already has in place a panoply of regulatory tools that will prevent cross-subsidization or other anticompetitive practices, without skewing the competitive marketplace. The Joint Cost Rules ensure that no subsidies can flow between regulated and unregulated services and products.[12]

quarterly ARMIS reports provide highly detailed, disaggregated cost and revenue reports in a computerized format.[14] The Commission's broad complaint and investigative authority facilitates detection and remedy should any problems elude its detailed accounting and reporting requirements.[15]

The Commission has in place additional protections against predatory rates, and these should be extended to all carriers. Today, a Price Cap carrier must justify a below-band tariff rate by showing that the rate exceeds average variable costs.[16] The Commission should require that all carriers in competitive markets must be prepared, on short notice, at the request of any party or the Commission, to justify as exceeding average variable cost the rate for any service.

These protections readily allow the Commission to adjust its tariffing requirements to the realities of the competitive market, confident that it can prevent, or detect and quickly remedy, any misallocation of costs or other anticompetitive activity before it adversely affects the marketplace. Accordingly, streamlined tariff provisions should apply to all carriers that serve competitive markets.

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[14] 47 C.F.R. Part 43.

[15] *See, e.g.*, 47 U.S.C. §§ 154(i), 208, 218, 220(c).

[16] Policy and Rules Concerning Rates for Dominant Carriers

III. Streamlined Tariff Regulations Must Be Consistent With the Communications Act.

Some of the streamlining provisions that the Commission proposes, however, violate the Communications Act and should not be adopted. In particular, the Commission cannot lawfully permit carriers to specify maximum rates, or a range of rates, for their services, as it proposes.[17] It must provide for public posting of the tariff.[18] In short, it cannot make tariffing a *pro forma* requirement that merely pays lip service to the requirements of Section 203.

In reversing the Commission's forbearance policy, under which non-dominant carriers were relieved of tariff filing obligations, the Court of Appeals made it crystal clear that the Commission's authority to modify provisions of Section 203 is limited to "change in incidental or subordinate features," not abandonment of a statutory obligation.[19] Section 203(a) specifies that a carrier "shall" file tariffs "showing all charges" for its interstate and foreign common carrier services.[20] Similarly, Section 203(c) prohibits carriers from charging "a greater or less or different compensation ... than the charges specified"

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[17] Notice at ¶ 22.

[18] The Commission appears to believe that the public will obtain rate information from the carrier, not from the tariff. *Id.* at n.41.

[19] *American Tel. and Tel. v. FCC*, 978 F.2d 727, 736 (D.C. Cir. 1992) ("*AT&T*").

[20] 47 U.S.C. § 203(a) (*emphasis added*).

in the effective tariff.[21] The *AT&T* decision teaches that the Commission has no authority to waive these provisions.

Permitting a range of rates, or a maximum rate, does not satisfy the requirements of these sections. A range of rates is not a "specified" charge for a service. It allows a carrier to list maximum charges that greatly exceed the actual rate any customer would conceivably be asked to pay, and a minimum rate that is below the actual rate floor it intends to charge.[22] Allowing a tariff to state only a maximum rate is even more egregious.

It allows the carrier to charge a customer a rate anywhere from zero to the specified level. Carriers that have already filed tariffs with maximum rates have generally set the maximum at a level that is far above the rate it could reasonably charge in a competitive environment.[23] Such tariffs are inconsistent with the explicit requirements of Section 203 that tariffs must *specify all charges*. Any Commission rule authorizing such tariff provisions must therefore fail.[24]

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[21] 47 U.S.C. § 203(c) (*emphasis added*).

[22] Teleport's interstate tariff, for example, provides a range of as much as 650% for its interstate services. Teleport Comm-

The Commission's proposal is also an open invitation to carriers to discriminate among customers, in violation of Section 202(a).[25] Carriers would be free to negotiate a different rate for the same or like services with each customer, which would violate Section 202(a). The Commission's proposal, however, invites and condones such unlawful discrimination.

The Commission proposes to allow nondominant carrier tariff filings may be made on one day's notice,[26] to eliminate the obligation to file cost and other support,[27] and to permit

entrants. As shown above, the Commission has in place sufficient rules and procedures to prevent cross-subsidization and predatory pricing. Once a market is competitive, there is no justification for applying different requirements to different carriers in that market.

The Commission recognizes that it has the authority to investigate the lawfulness of an effective tariff, on its own motion or on complaint.[29] It should also acknowledge that it can lawfully reject effective tariffs under certain circumstances. The Supreme Court has held that the Interstate Commerce Commission[30] has the right to reject an effective tariff which clearly violates a statute or regulation when that violation did not become apparent until after the tariff went into effect.[31] When the Commission's rules allow a tariff to become effective before it has had an opportunity to review its lawfulness, and before parties have been able to submit petitions to suspend or reject

the unlawful provision becomes apparent, the Commission has an *obligation* to reject it.[32]

IV. Conclusion

This proceeding presents the Commission an opportunity to recognize that regulatory requirements imposed on interstate carriers should be based upon the competitiveness of the market in question, not on the identity of the carrier or its position in some other market. Existing tools fully protect competitors against cross-subsidization and other anti-competitive practices -- discriminatory tariff requirements are not needed for this purpose. Under these circumstances, there can be no justification for differentiating among carriers serving competitive markets. Instead, the Commission should allow streamlined

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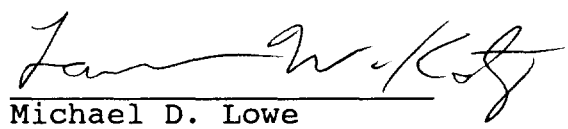
[32] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.* 350 U.S. 332, 333 (1956).

tariffing by all carriers operating in these markets, consistent with the Act's requirements that those tariffs specify all rates.

Respectfully submitted,

The Bell Atlantic Telephone Companies

By Their Attorneys



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